

# Comprehensive Permit Training



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# Topics

- Background
- Organizing for the review
- When is a project Economic
  - Example

# Chapter 40B — “Uneconomic”

## Chapter 40B: Section 20. Definitions;

"**Uneconomic**", any condition .... that it makes it impossible ... to proceed and realize a reasonable return in building ... housing within the limitations of the subsidizing agency .....

Section 22. Whenever an application ..... is granted with conditions that make such housing **uneconomic**, the applicant shall have the right to appeal to HAC

## Chapter 40B: Section 23. Hearing by housing appeals committee;

Section 23. The hearing by the HAC .....shall be limited to the issue of whether, .....in the case of an approval with conditions, ..... such conditions make the construction **uneconomic** and consistent with local needs. .... If the committee finds, the conditions imposed, makes the building **uneconomic** and inconsistent with local needs, it shall order such board to modify or remove any condition or requirement so as to make the proposal no longer **uneconomic** ..... Decisions or conditions and requirements imposed by a board of appeals that are consistent with local needs shall not be vacated, modified or removed by the committee notwithstanding that such decisions or conditions and requirements have the effect of making the applicant's proposal **uneconomic**.

# 40B

- **Fact** — Massachusetts Supreme Judicial Court
- **Opinion** — Housing and Appeals Committee
- **Folklore** — Everywhere

# The 40B Process

## Pre Receipt of Permit

- CEO or BoS given 30 days to comment
- Review and update Rules and Regulations
- Discuss Organization
- Identify Leader or leaders?
- Designate voting members
- Engage legal support
- Identify general goals

30 to 45 days

## Open Hearing within 30 days

- Determine if application is complete
- Review project
- Agree on Finances
- Identify concerns—Boards, Abutters, etc
- Select Peer Reviewers
- Schedule Hearings
  - Public Health
  - Public Safety
  - Environment
  - Financial
- Evaluate options
- Prepare draft decision

3 to 18 months

## Close Hearing

- Write decision (10 to 50 pages)
- Vote on decision
- File decision

40 days

Time to evaluate:

Cost:

ZBA Members:

3 to 24 months

\$3K to \$50K

Majority to vote, all voting members must attend all meetings

# Scheduler

(Refer to Workbook pg 21)

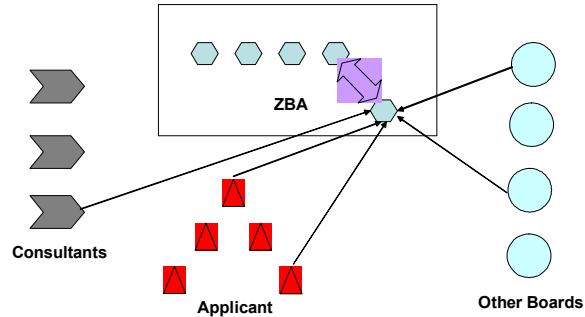
Date	Theme	Participants	Presenter
July xx	Introduction	All Boards	Applicant
August	Public Safety	Police, Fire, PB	Traffic Peer Reviewer
September	Public Health	ConCom, BOH	Peer Reviewer for Drainage and ground water
October	Site Review	PB, BOH, ConCom	PB or peer review of site plan
November	Environment	ConCom	ConCom or peer reviewer of environment
December	Exceptions Requested	All Boards	Applicant
January	Financial Review	All Boards	Peer Review of Proforma

# Organizer (Refer to Workbook pg 22)

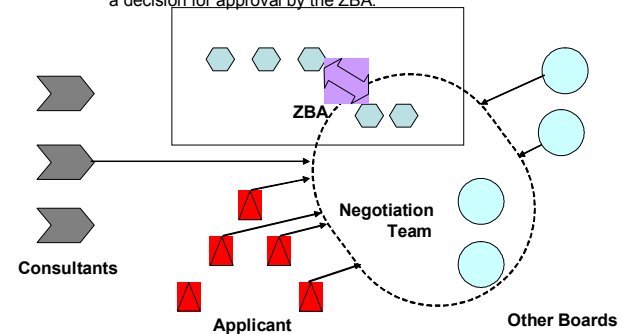
<b>H&amp;H Associates LLP</b> <b>Comprehensive Permit Organizer</b> <b>Project: XXXXXXXX, Town</b> Potential Resources to review the 40B Application												
Issues to be evaluated by ZBA	Priority (High Med Low)	ZBA	Board of Health	Con Com	Planning Board	DPW	Water and Sewer Dept	Building Inspector /Comm	Other Fire/ Police Chief	Housing Authority	Legal Counsel	Peer review Resources
<b>40B Issues</b>												
Application Complete		X										
Review Fees		X										
Development Team and Credentials		X										
Site Control		X										
Right of Way		X										
Proforma		X										
Subsidizing Agency		X										
List of Exceptions		X	X	X	X		X	X			X	
Appraisal		X										
Deed Rider		X										
Regulatory Agreement		X										
Monitoring Agreement		X										
Condo Association		X										
Land Donation to Town		X										
Writing the decision											X	
<b>Issues to be evaluated by ZBA</b>	<b>Priority (High Med Low)</b>	<b>ZBA</b>	<b>Board of Health</b>	<b>Con Com</b>	<b>Planning Board</b>	<b>DPW</b>	<b>Water and Sewer Dept</b>	<b>Building Inspector /Comm</b>	<b>Other Fire/ Police Chief</b>	<b>Housing Authority</b>	<b>Legal Counsel</b>	<b>Peer review Resources</b>
<b>Public Health</b>												
Wastewater Treatment			X	X			X					
Water supply			X	X			X					
DEP Approval/ Feedback			X	X			X					
Drainage			X		X							
Storm Water Management			X		X							
Chemical Pollutants			X									
Inspection and			X									

# Organizational Models (Refer to Workbook)

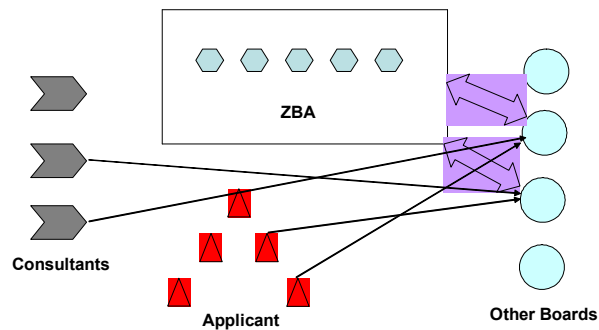
**ZBA Member Negotiator** — for each 40B, identify a ZBA member as the negotiator for the each application to negotiate a deal and bring back to the ZBA for approval.



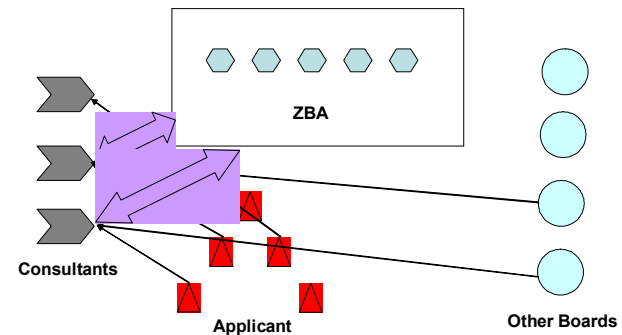
**Negotiating Team** — members from other Boards and from town government join with one or two members of ZBA to negotiate with the developer and recommend a decision for approval by the ZBA.



**Distributed Decision Making** — appropriate boards and departments review the application and report to the ZBA with their conclusions and recommendations.



**Retaining Consultants** — consultants review and recommend a solution to ZBA.





# Why a Board must review the Pro Forma

- Unreasonable to impose a condition on the project without knowing the impact on profitability.
- Any excess profit will be returned to the town.
- Common denominator to all parties that allows for negotiating to avoid an appeal.

# Benchmark of “Uneconomic”

## ■ Profit Margins in the Building Industry:

- The National Association of Home Builders— Net Income before Tax of 6.4%. Small Volume Builders (less than 25 homes per year) average profit margin 5.0%.
- 23 public companies providing housing and ranging in size from \$11 million to over \$7 billion in sales per year, average profit before tax as a percentage of sales ranged from 4.9% to 8.2%. Average for all 23 companies —7.1%.

## ■ MassHousing Profit Margins:

- HAC Testimony —average profit 10% to 20% of TDC
- MassHousing approved projects at less than 10%
- Track record of approving applications that have a minimum profit as a percent of total development costs of 10%.

## ■ Recommended benchmark

- **12% of the Total Development Cost**

# Uneconomic as defined by 40B

- No guidelines exist
  - DHCD
  - HAC
  - Subsidizing agency— MassHousing, MassDevelopment, NEF
- Benchmark vary with cost of money
- Exact formulas are not defined

**Bad News is —No Guidelines**

**Good News is — Board may interpret results**

# Uneconomic

- Profits returned to community
  - Fee Simple —  $\text{Profits/TDC} > 20\%$
  - Rental —  $\text{Profits/Imputed Equity} > 10\%$
- Guidelines familiar to HAC
  - Fee simple —  $\text{Profits/TDC} > 12\%$ , No Developers FF or OH
  - Rental —  $\text{ROTA} > 5\%$   
 $\text{IRR} > 10\%$  includes residual value of property  
Return on Invested Capital

# New 40B Project

8-Dec-04

## Input to Model:

	Adjusted Proforma		Scenario # 1		Scenario # 2		Benchmark
	31-Aug-04		8-Dec-04		8-Dec-04		
Affordable Rate Units (2BR, 2BA)	11 \$ 149,500	11	\$166,500 25%	7	\$166,500 27%	\$	171,000
Market Rate Units --\$ per Sq Ft (GLA)	33 \$ 189.31	33	\$233	19	\$233	\$	233
Total	44	44		26			
Value of Land	\$723,000		\$723,000		\$723,000		\$723,000
Construction Cost/ sq ft	\$88		\$88		\$88		\$95
Additional Cost ID by Applicant			\$ 400,000		\$ 400,000		
Deny Exceptions Requested			Yes		Yes		\$460,000

## Output from Model:

	Adjusted Proforma		Scenario # 1		Scenario # 2		Benchmark
	31-Aug-04		8-Dec-04		8-Dec-04		
Average Market Rate Home	\$ 340,000	\$	418,468	\$	418,468		
Total Revenue	\$12,864,500	\$15,640,944	\$9,116,392				
Land Acquisition	\$723,000	\$723,000	\$723,000				
Hard Costs	\$8,430,450	\$9,357,289	\$6,446,320				
Soft Costs	\$1,508,152	\$1,761,692	\$1,072,961				
Total Cost of Development	\$10,661,602	\$11,841,981	\$8,242,281				
Net Profit	\$2,202,898	\$3,798,963	\$874,111				
PBT (% of Total Develop Cost)	20.7%	32.1%	10.6%				12.0%

# ***What a town needs to know***

- **Review local rules and regulations**
- **ZBA has control and influence**
- **MGL 40B is complex and not always logical**
- **There is no one source for all the answers**
- **It takes time and money**
- **Don't feel threatened by the HAC**
- **Determine the organization model to review**
- **Select a leader for the evaluation**
- **Understand the economics of the project**
- **Determine if a Partnership can be established**
- **The process is open until the hearing is closed**
- **Accurately document the decision**

# HAC Record 1986 to 2002

- Two-thirds approved by the ZBA
  - 53% granted with conditions.
- One-third were appealed to HAC (419 cases).
  - 41% appeals to HAC, 1/2 between 2001-2002.
  - 69% resolved before a decision was made by HAC
    - 45% of the cases withdrawn, dismissed, or settled independently
    - 24% of the cases involved a negotiated settlement
  - 31% of the cases resulted in a decision by HAC
    - 84% were ruled in favor of the developer and
    - 16% were ruled in favor of the municipality.

# Model Rules and Stuborn

**"If the Board has serious concerns about the financial soundness of a proposal or suspects that profits may be excessive, it should consult with the subsidizing agency. Only if it is apparent that these matters are not being addressed by that agency should the Board conduct an independent inquiry."**— Guidelines for Model Local Rules, Section IIC. Guideline 4 Section 5) Financial Information.

**"In particular, the Board should review the profit limitation, since any excess profit will be returned to the town. It should consider defining the profit limitation in more detail than it is now defined in the regulatory agreement. And, in place of the language currently in the regulatory agreement, it might require a full compilation and certification of total development costs and total revenues, on a federal income tax basis....."**—*Stuborn Ltd. Partnership v. Barnstable*, No. 98-01 (Mass. Housing Appeals Committee Mar. 5, 1999), Section V. C.)